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OFFICE SUPREME COURT U.S.
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United States Supreme Court.

ANNA A. CLARKSON, *et al.*
Plaintiffs in Error,

vs.

THE ATTORNEY GENERAL OF THE STATE OF NEW JERSEY, *et al.*,
Defendants in Error.

In Error,
No. 80.

BRIEF OF PLAINTIFF'S ERROR

WALTER L. CLARKSON,
Of Counsel.

NEW YORK.
GREAT AMERICAN ENGRAVING AND PRINTING CO., 26 BEEKMAN STREET.
1882.

Supreme Court

OF THE UNITED STATES.

ANNA A. CLAKSON and ROBERT L. CLARKSON, her husband, HARRIET WETMORE, and GEORGE W. WETMORE, her husband, SAMUEL SANDS, JOSHUA SANDS, and JOHN SANDS,
Plaintiff's in Error, and
THE ATTORNEY GENERAL OF THE STATE OF NEW JERSEY, and MARTHA B. STEVENS, *et al.*,
Defendant's in Error.

In Error,
No. 88.

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BRIEF OF PLAINTIFFS IN ERROR.

STATEMENT.

This suit was commenced by Martha B. Stevens, in her own right, and as executrix of her husband, Edwin A. Stevens, against her co-executors, Messrs. Shippen and Dod, and the Attorney General of the State of New Jersey, *et al.*, for the construction of the will of said Edwin A. Stevens. December 21, 1868.

The executors, Messrs Shippen and Dod, answered that the heirs at law of Robert L. Stevens, (including these plaintiff's in error,) under the resolution of Congress of July 17, 1862, might have some interest in the suit, and prayed, if they had, that it be determined in this action January 5, 1872. The Attorney 3

General, answered, December 22, 1868. The plaintiff's
then named all said heirs at law in a supplemental bill
4 April 12, 1872. The heirs at law answered, January 20,
1873, claiming that they had an equal interest, under the
said resolution of Congress, as Edwin A. Stevens, and
prayed that his executors account to them for the monies
received by said executors from the United States under
the contracts of said government with Robert L. Stevens,
and that the unfinished vessel, and the land mortgaged
for the faithful performance of said contracts, be sold for
the purpose of such accounting, and if the proceeds are
not sufficient that then the balance be paid out of the
estate of Edwin A. Stevens. July 21 1863; the Attorney
General, filed an information and had all the previous
5 pleadings stayed, and compelled the other parties to
to answer same.

April 25, 1874, The executors of Edwin A. Stevens, filed answers to information. December 6, 1875, the heirs at law, these plaintiff's in error, filed another answer asserting their rights over again.

Assignment of Error.

The plaintiffs in error aver and say that in the record and proceedings in this cause and also in the making of the decree herein there is manifest error in this:

1st. That the said Court of Chancery and of Errors
and Appeals of the last resort did order, declare and de-
6 cree that by the true construction of the resolution of
Congress, approved July 17, 1882, hereinafter mentioned,
that the right and interest of the United States in the
said vessel passed to the said Edwin A. Stevens as resi-
duary legatee of Robert L. Stevens.

2d. That the said Courts did order, declare and decree that the said Edwin A. Stevens owned and possessed the said battery up to the time of his death, and that the said vessel passed under the last will and testament and codicil thereto of Edwin A. Stevens.

3d. That the said Courts did order, declare and decree that the bequest of said vessel made by the said Edwin A. Stevens to the State of New Jersey is absolute and that the title to the said vessel has vested in the said State.

4th. That the said Courts ought to have decreeded 7
that by the terms of the contract entered into between
Robert L. Stevens and the Secretary of the Navy, and
in particular by the terms of the contract of the 14th of
November, 1844, the title to said war steamer in its in-
complete state and to every part and parcel thereof vest-
ed in the United States, and became and remained the
property of the United States until the passage of the
before mentioned act, wnen they passed by the terms
thereof to the heirs at law of Robert L. Stevens, that is
to say, to James A. Stevens, Sophia L. V. C. Stevens,
Estha B. Stevens, Juliania Conover, Mary Sands, Ma-
tilda Brown, Anna A. Clarkson, Harriet S. Wetmore,
Joshua Sands and Samuel Sands. 8

5th. That the said Courts refused to decree that by the terms of said resolution the contract, and all the right of action thereon, including the mortgage to secure the faithful performance thereof, passed to the heirs at law of Robert L. Stevens under the terms of said resolution.

6th. That the said Courts refused to decree that the words "heirs at law" mean all the heirs ot law of Robert L. Stevens, living at the time of the gift.

7th. That the said Courts refused to decree that the
executors of the residuary legatee who was the executor
of Robert L. Stevens, must account to the other heirs
for the moneys received by Robert L. Stevens from the 9
United States, with interest, and that the unfinished
battery, and the land mortgaged for the faithful per-
formance of the contract to complete the same, should
be sold to pay and satisfy the monies that were due the
United States, and that if the proceeds of sale be not
sufficient to pay the same, with interest, the deficit to be
made out of the estate of Edwin A. Stevens.

8th. And that said Courts refused to decree that said executors should account to the other heirs for the value of the materials and machinery sold and taken away by said executors.

10 The said resolution is as follows:

"A resolutiou releasing to the heirs at law of Robert L. Stevens, deceased, all the right, title and interest of the United States in and to Stevens Battery.

"Resolved, by the Senate and House of Represetatives of the United States of America, in Congress assembled. That all the right, title and interest of the United States in and to Stevens Battery be and the same are hereby *released and conveyed to the heirs at law of the said Robert L. Stevens or their legal representatives.*"

Approved July 17th, 1862, p 60.—1.

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POINTS.

1.—What were the rights of the United States before this gift was made?

11.—What are the rights of the heirs at law as grantees of the United States under the said resolution of Congress.

1. The rights of the United States arose as follows: By an Act of Congress, approved April 14th, 1842, entitled, "An Act authorizing the construction of a war steamer for harbor defense," it was enacted, "That the Secretary of the Navy be and he is hereby authorized to 12 enter into contract with Robert L. Stevens for the construction of a war steamer, shot and shell proof, to be built principally of iron, upon the plan of said Stevens, provided that the whole cost, including the full armament, engines, boilers and equipments, in all repects complete for service, shall not exceed the average cost of the steamers *Missouri* and *Mississippi*," page 48, viz.,

$586,717.84, p. 53—26, l. 25. A contract was accordingly
entered into, bearing date the tenth day of February,
1843, between Abel P. Upsham, Secretary of the Navy,
and the said Robert L. Stevens, for the construction of
the battery by the latter. And as this contract was found 13
to be "too loose and indefinite," a second contract was
made, dated the fourteenth day of November, 1844, between John Y. Mason, Secretary of the Navy of the
United States, and the said Robert L. Stevens. A third
contract was also entered into between these latter parties
merely to extend the time for completing the vessel four
years longer, to September 9th, 1852, pages 48, 50 and 55.

In the contract dated the fourteenth day of November,
1844, there is this agreement: "And it is hereby further
stipulated and agreed that the said Robert L. Stevens,
in lieu of other security for the faithful performance
of this contract on his part, shall make to the United
States a good and sufficient mortgage which cannot in
anyway be affected by previous mortgage or by previous 14
judgments against the said Stevens, on all the land, docks,
wharves, ships, and all their appurtenances, belonging to
and embraced within the establishment at Hoboken, New
Jersey, at which the said war steamer is to be constructed,
with ample power to enter upon and sell the same in case
of failure on the part of the said Stevens to fulfill his
part of this contract, or that of which this is explanatory,
or so much thereof as shall be necessary to complete any
deficiencies on the part of the said Stevens, p. 53, line 8.
Said mortgage is recorded at the office of the Clerk at
Hudson City. Lib. 5, p. 232, p. 39, line 10, and page 37.

Said contract also contains the following stipulations:
"The said Robert L. Stevens and John Y. Mason, as 15
Secretary of the Navy Department, do further stipulate
and agree, that the Secretary of the Navy Department
shall appoint, and the said Stevens shall admit within his
establishment for building said war steamer, some person or persons, whose duty it shall be to attend at the
works of the said Stevens, or where the said war steamer,
engines and machinery are to be built, and to receive and

N. Y., 167; 1 Wend., 58; 1 Hill, 287; 7 Term, 181—25 United States, all materials of every description which shall be delivered therein for constructing the said war steamer, her engines, boilers, and all their dependencies, 16 which materials when so received and receipted for shall be distinctly marked with the letters U. S, and shall become the property of and belong to the Unites States" P. 52, line 5.

The United States by this express agreement owned all the materials thus delivered for the construction of this war steamer, and as a matter of law also they owned it; Schudder *v.* Calais Steamboat Co., 1 Cliff, 370, and page 45, line 30 They had also this preferred mortgage. By contract September 9th, 1848, the time for delivering the battery was extended to September 9th, 1852. Robert L. Stevens, died in 1856, without delivering it; he therefore died indebted to the United States government for the amount it had advanced, which was secured by said 17 mortgage. Edwin A. Stevens, the very year Robert L. Stevens died, altered the original plans, and in 1861, made proposals to Congress to finish the vessel on his own plans which were refused, p. 57,—39 and 71, line 5. The right then of the United States government was to have the battery sold, the land mortgaged for the faithful performance of the contract sold, and if there was any deficiency to have it paid out of the estate of Robert L. Stevens. Edwin A. Stevens, took the estate of Robert L. Stevens subject to this debt, and the executors of Edwin A. Stevens, must account to the heirs at law for the monies so received, with interest. The Secretary of the Navy did at one time threaten to sell the materials, "But 18 the defendants themselves refusing to carry into effect the contract, they ought not to be permitted to set it up as the pretext for holding the money advanced. If the contract is rescinded in part, it must be *in toto*; and the plaintiff's right to recover back the mony paid is undeniable." 12 Johns., 276; 1 Term, 133; 1 Bos. & Pull. N. S., 354; 5 Johns., 87; 7 Johns., 132; 55 N. Y., 664; 54 N. Y., 277, citing 3 Dutch., 514. In Dermott *v.* Jones, 2

receipt for on account of the Navy Department of the
Wallace, 1. "The defendant in error," says Judge
Swayne, made a covenant. That covenant it was his
duty to fulfill, and he was bound to do whatever was ne-
cessary to its performance. Against the hardship of the 19
case he might have guarded by a provision in the con-
tract. Not having done so it is not in the power of this
Court to relieve him. * * It is a well settled rule of law
that if a party by his contract charge himself with an
obligation possible to be performed, he must make it
good, unless its performance is rendered impossible by
the act of God, the law, or the other party. Unforeseen
difficulties, however great, will not excuse him." Also 2
Wallace, 728.

The vessel was never delivered at the Brooklyn Navy, yard, as agreed, p. 54, line 28, p. 53, line 24 and p. 45 line 28.

II.—the heirs then took this debt, secured by the mort- 20
gage, and we have only to notice the objections raised to
their receiving it.

It is claimed that the phrase "heirs-at-law of the said Robert L. Stevens, &c.," means the residuary legatees to whom he left his interest in the battery by his Will, There is nothing upon the face of the Act to excite doubt, there is therefore no patent ambiguity; there are not two sets of "heirs-at-law," who claim this gift, there is therefore no latent ambiguity. If the Court has the power to strike out plain words, they have also the right to insert whatever name or names they please, and then the gift is not the gift of Congress but of the Court.

Grant *v.* Naylor, 4 Cranch, 235. 21

In this case, *C. J.* Marshall says: "This is not a case of ambiguity patent, for the face of the letter can excite no doubt. It is not a latent ambiguity, for there are not two firms of the name of John and Joseph Naylor & Co. to either of which this letter might have been delivered". And in the case before this Court there are not two sets of heirs that claim this gift, but one of the heirs, the New Jersey heir, takes the whole.

In Dunn *v*. Read, 10 Peters, 527, Judge McLean says "But it is not for the Court to say, where the language 22 of the statute is clear, that it shall be so construed as to embrace cases, because no good reason can be assigned why they were not excluded from its provisions. We are unable to say why the benefit of this Statute was given to those who held under deeds, proved by the subscribing witnesses, and withheld from those whose deeds were proved by the acknowledgement of the grantor. In most cases, if not in all, proof by acknowledgement would be deemed more satisfactory, than by witnesses; but the Legislature having made a distinction between the cases, whether it was intentional or not, reasonable or unreasonable, the Court are bound by the clearly expressed language of the Act."

23 *C. J.* Marshall says in United States *v*. Fisher, 2 Cranch., 358: "It is undoubtedly a well established principal in the exposition of Statutes, that every part is to be considered, and the intention of the legislature to be extracted from the whole. * * * Neither party contends that the title of an act can control plain words in the body of the Statute; neither denies that taken with other parts, it may assist in removing ambiguities. Where the intent is plain nothing is left for construction."

And the same learned *C. J.* says in Paulina's Cargo *v*. The United States, 7, Cranch, 52; "In construing the e laws it has been truly stated to be the duty of the Court 24 to effect the intention of the legislature; but this intention is to be searched for in the *words* which the legislature has employed to convey it."

"The assigned reason may aid in the construction of doubtful words, but cannot warrant the rejection of words that are clear." Williams on Exrs., p. 933, ed. 1849. *J.* Washington, in Evans *v*. Jordan, 9 Cranch, 199, says: "The argument, founded upon the hardship of this and similar cases, would be entitled to great weight if the words of this proviso were obscure and o en to construc-

tion. But considerations of this nature can never sanction a construction at variance with the manifest meaning of the legislature, expressed in plain and unambiguous language. The argument of the defendant's counsel, that unless the construction they contend for be adopted, 25
the proviso is senseless and inoperative, is susceptible of the same answer." United States *v.* Palmer *et al.*, 3 Wheaton, 610, p. 630. The Court says: "If it be answered, that although this opinion was entertained, yet, if the legislature was mistaken, those whose duty it is to construe the law must not yield to that mistake, we say, that when the legislature manifests this clear understanding of its own intention, which intention consists with its words, Courts are bound by it."

Ch. J. Marshall says in United States *v.* Wiltbarger, 5 Wheat., 76: "The intention of the legislature is to be collected from the words they employ, where there is no ambiguity in the words there is no room for construc- 26
tion."

"Where the words of a statute are doubtful, general usage may be called in to explain them; but where they are clear, the usage of a particular place cannot control them." 1 T. R., 728.

"A *casus omissus* can in no case be supplied by a Court of law, for that would be to make laws, 1 T. R., 52.

The United States *v.* William G Temple. "To hold that for one class of travel he shall have eight cents per mile and for the other only his actual expenses is to make the law and not to construe it. The law is as plain and unambiguous as language can make it, it must be given its natural and obvious meaning, and thus interpreted it 27
leaves the plaintiff in error no ground to stand on" Oct. Term, 1881.

"Where the language of a Statute is transparent and its meaning clear, there is no room for the office of construction There should be no construction where there is nothing to construe (United States *v.* Wiltbarger, 5 Wheat, 95; Cherokee tobacco, 11 Wall, 621)," cited in

Edwin M. Lewis, trustee of Jay Cooke & Co. bankrupts, appellants *v.* United States, 92 U. S. Supreme Ct., 621.

"All Statutes must have a construction according to the language employed, and where no ambiguity exists, 28 Courts cannot correct supposed defects."

Benton *v.* Wickwire, 54 N. Y., 226.
Harrison *v.* Nixon, 9 Peters, 483, p. 518.

Or as Judge Ford admirably expressed the rule in Gibbons *v.* Ogden, 3 Hals., 295: "These arguments upon an inquiry into *what should have been* the intent of the act, might be entitled to much weight and consideration; but we pursue a much drier question when we limit our judicial inquiry, as we are bound to do, to what the intent of the act *is*, Courts of law may, where the words of an act convey no clear meaning, as the means of explaining an intricate or perplexed passage, resort to the consideration 29 of the subject matter and the nature of the mischief to be remedied, but where words clash with no other paragraph, section, or sentence, in the same or any other statute, carry a plain and manifest meaning, they overcome all rules of construction, and must be taken as they read."

This Court say in Merritt *v.* Welsh, 104 U. S., 694. "It has been said with much truth, "where law ends tyranny begins." * * * "If experience shows that Congress acted under a mistaken impression, that does not authorize the Treasury Department or the Courts to take the part of legislative guardians, and by construction make new laws, which they imagine Congress would have made had it been properly informed, but which Congress 30 itself on being properly informed, has not as yet seen fit to make.

And Greenleaf in his Evidence (sec. 277) says: "But (as the parties) have constituted the writing to be the only outward and visible expression of their meaning, *no other words* are to be added to it, or substituted in its stead. The duty of the Court in such cases is to ascer tain, not what the parties may have secretly intended, as contra distinguished from what their words express, but what is the meaning of the words they have used."

Judge Story in Blanchard *v.* Sprague, 3 Summers, Reps. 279. says "I have not been able to find a single case, 31 where it has been held, that the Court may substitute other words or other dates, in order to maintain an act, making erroneous references to things aliunde." Finally this Court say in the Trade-mark case, 100 U. S. Reps., 99. "If we should in the case before us, undertake to make by judicial construction a law which Congress did not make, it is quite probable we should do what, if the matter were now before that body, it would be unwilling to do," citing 5 Cranch, 304.

But even if there is any doubt about the construction of an instrument, the Court leans to that which includes 32 all the children (Will. on Ex., side-paging 1,074). Such a construction takes property away from a number of heirs and gives it to only one of their number; and says *C. J.* Marshall in Rutherford *v.* Greene, 2 Wheat., 196, "No general terms intended for property, to which they may be fairly applicable and not particularly applied by the legislature, no silent, implied and constructive repeals ought ever to be so understood as to divest a vested right."

This resolution, being an appropriation of money, was read three times, both in the Senate and House of Representatives, and printed three or four times in the *Congressional Globe*, would not, therefore, any mistake have been discovered if it had existed? 33

But even admitting that intention can change plain words, we insist that Congress did not intend to make this gift to Edwin A. Stevens only:

First.—Because Edwin A. Stevens was most of the winter of 1862 in Washington with Mr. Dod, trying to induce Congress to pass some law in reference to the battery, and in July of the same year Congress did pass this resolution, and Edwin A. Stevens' name was

not even mentioned in the gift, and he took only it in con-
nection with others. How can it be supposed then
that it was the intention of Congress to make this gift
only to him? Was it not the intention of Con-
34 gress to make their gift so as to include the heirs of
Robert L. Stevens, to whom the latter never left a cent,
rather than to the one to whom he left the bulk of his
property?

Second.—The acts of Edwin A. Stevens show that he knew the gift was not to him alone. He writes, subsequent to this resolution, to the French government, pages 11 line 1 35, line 22, "I will guaranty the title to the battery against all claimants." Can it be supposed he thought there were no other claimants? Again, Mr. Shippen, his executor testifies; "I know that Mr. Stevens was very much astonished when he found that this act had been passed," p. 48, line 8.

35 *Third.*—Because equality is equity and it is not reasonable to suppose that Congress intended to give the whole interest of the United States to the New Jersey heir, when his name is not specificially mentioned, and when they knew he was the wealthiest of the heirs.', "Intentions ought to be subservient to the laws and not the laws to intentions," Co. Litt., 314.

Fourth.--Can it be seriously insisted that it was the inten-
tion of Congress to only benefit Edwin A. Stevens, where
the latter has refused faithfully to perform the contract,
by totally ignoring it, and proceeding under a plan of his
own, which a committee appointed for the purpose, re-
fused to accept? p. 71, line 6, and his executors sold the
36 old iron and machinery, and never accounted for the mo-
ney to the other heirs, p. 46, line 5. But what says the
law about such conduct; "If one man takes another's
money to do a thing and refuses to do it, it is a fraud,"
Lord Mansfield, 2 Bur,, 1010. Was it to countenance
such conduct that Congress must have intended to make
this gift only to Edwin A. Stevens? p. 57, line 38.

Fifth.—By the complainants naming them in their amendments to their bill, and by the Attorney General and the executors consenting to such amendments, does it not seem that they thought said heirs must have been intended to receive some benefit by said gift, and as hav- 37
ing been included in the terms of said resolution? pages 19, line 15 and p. 70, line 21.

Sixth.—What the Chancellor says: The case of Stevens *v.* Bagwell, 15 Vesey, 140, is the only case cited by the Chancellor to sustain the position he takes of changing plain words; he says, page 72,—38: "a warrant of the British Treasury ordering payment of prize money to the 'representatives' of a deceased lieutenant of the British Navy, was construed to entitle his residuary legatee to it. Said the Court 'The captured effects being condemned to the crown, no right to any part of the produce can accrue to any one, except by the gift of the crown, and as Lieutenant Stevens died before any gift was made, 38
his Will could have no direct operation upon the subject of that gift. But the intention of the crown, in all cases of this kind, is to put what is in strictness of bounty upon the footing of matter of right.'" And here the learned Chancellor makes an hiatus in his quotation, leaving out the only reason given for the decision; it is as follows: "The service performed is thought worthy of reward; and though the party performing it died before payment, the claim of bounty from the crown is considered as transmissible to his representatives, in the same plight and condition as the claim for wages, or any other stipulated or legal renumeration of service." Has Robert L. Stevens or Edwin A. Stevens rendered any service thought worthy of reward? And then the Chancellor 39
continues his quotation "In such cases the crown never means to exercise any kind of judgment or selection with regard to the persons to be ultimately benefited by the gift. The representatives to whom the crown gives are those who legally sustain that character, but the gift is made in augmentation of the estate and not by way of personal bounty to them." But in the present case the

Chancellor does exercise his judgment, and does make a
selection with regard to the persons to be ultimately
benefited by this gift. He selects one of the heirs, who
is not even named in the gift, except in connection with
40 the others, and makes him the only recipient of this gift
of Congress. In the case quoted the Court makes the
gift to all the brothers and sisters of Lieutenant Stevens,
and says that they "legally sustain that character" of
"representatives." The only person who did not take
was a sister-in-law, Catharine Pierce, and not a "representative"
of Lieutenant Stevens. In the present
case the Chancellor makes the gift to a "residuary legatee"
who does not legally sustain the character of "the
heirs at law," and takes the gift away from the brothers
and sisters, p. 73, line 21. Even though he says: "There
appears to have been no reason why the government
should make the heirs at law rather than the next of kin
41 or residuary legatee of Robert L. Stevens the recipients
of its bounty," p. 723 line 7. Says Judge McLean, in 10
Peters, above: "Whether it was intentional or not, reasonable
or unreasonable, the Court are bound by the
clearly expressed language of the Act." The Chancellor
continues: "Congress did not intend by the resolution
of 1862, a grant to the heirs at law of Robert L. Stevens,
or their legal representatives for their benefit," p. 73 line
11. This is an expression of opinion, we think, unwarranted
by the facts of the case, and also contrary to the
statement of one of the heirs at law to counsel, that Edwin
A. Stevens told said heir that he intended to have
the act passed for her benefit as well as his own. But
the case, in 15 Vesey R,, is overruled by the U. S. Sup-
42 reme Ct., on the very point, that the gift does not relate
back and pass under the Will. Emerson's Heirs *v.* Hall,
13 Peters, 221,409. The Court says: "a claim having
no foundation in law, but depending entirely on the generosity
of the government, constitute no basis for the action
of any legal principle It cannot be assigned. It
does not go to the administrator as assets. It does not
descend to the heir. And if the government from mo-

tives of public policy, or any other consideration, shall think proper, under such circumstances, to make a grant of money to the heirs of the claimant, they receive it as a gift or pure donation A donation made, it is true, in reference to some meritorious act of their ancestor, 43 but which did not constitute a matter of right against the government. * * * and we think that the payment which has been made to them under this act, has been rightfully made, and that the fund cannot be considered as assets in their hands for the payment of debts." But the Chancellor seems to admit that all the heirs take this gift when he says page 73, line 16: "and the heirs-at-law or their legal representatives will be held to have received title to it in trust for the residuary legatee, &c." Eleven of the heirs then must hold their shares in trust for a residuary legatee who is not even named or legally described; and though he says above, there is "no reason" why the heirs rather than the next of kin should receive this gift. 44 Says Lord Nottingham, in Cook *v.* Fountain, 3 Swanton, 585: "There is one good general and infallible rule that goes to both kinds of trusts. It is such a general rule as never deceives; a general rule to which there is no exception, and that is this—the law never implies, the Court never presumes a trust but in case of absolute necessity. The reason of this rule is sacred, for if the Chancery do once take liberty to construe a trust by implication of law, or to presume a trust unnecessarily, a way is open to the Lord Chancellor to construe or presume any man in England out of his estate."

In Penny *v.* Turner, 2 Phillips, 493, "There was a gift to the testator's three sisters or their children, as his mother should by deed or Will appoint; and the Lord Chancellor held it to be a gift, in default of the appointment, to the whole class of daughters and the children, not on the ground that *or* was to be construed *and*, but because it was referable only to the power given to the mother of selection among the class; and as that power could not be exercised by the Court, the whole must take equally." 45

The Chancellor further says: "The preamble of the subsequent resolution of Congress consenting that this State accept the vessel is some evidence of the intention of that body in the former resolution. It recites that 46 Edwin A. Stevens was in his lifetime the owner of the battery, and that upon the building thereof large sums of money had been spent by him and his brothers; and that he had by his last Will and testament (the United States having previously relinquished all claim to the ship) left it to be finished by his executors, &c.," p. 73, line 4.

In the first place, Edwin A. Stevens was part owner of the battery at that time, under said resolution of 1862; but not one word is said about the money spent by the government. And this Act must be considered simply as an application by the executors of Edwin A. Stevens, and as reciting their view of the case; and as it had previously mentioned that Edwin A. Stevens was the owner, 47 why did it not recite that the relinquishment was to him, the same as the Chancellor has decreed. If we are to gather the intention of Congress from this Act, even here his name is not even mentioned as the donee when citing the former resolution. This application of the executors of Edwin A. Stevens to Congress must therefore be taken as a declaration against them.

Congress did not intend to make their gift to one who refused to perform their contract, and kept the money they had advanced under the same, kept the land mortgaged for the faithful performance of the same, and kept the battery which should have been delivered at the 48 Navy Yard at Brooklyn, p. 53, line 23. He only spent $89,185.37 as executor, p. 45, line 16. Let us now notice the objections the Chancellor makes as to the title to the battery itself, which we think is only of importance as regards the acts of the executors of Edwin A. Stevens, which we shall notice later, as these appellants only ask that the vessel be sold, etc., and the debt owing to the United States and assigned to them be paid.

The Chancellor says: "The fact that Edwin A. Stevens claimed to be the owner of the battery in his lifetime was a matter of public notoriety, as was also the fact that by his Will he had disposed of it as his property. And yet it does not appear that any adverse claim to it was made by or in behalf of or under any of the heirs at law or next of kin of Robert L. Stevens until it was set up in 49 this suit by answer in April, 1872. The heirs at law who now claim it adversely stood by and without even so much as a protest, as far as appears, seen Edwin A. Stevens expend upon it, etc., p. 71, line 28.

First as to the ownership; S. B. Dod, one of the executors testifies, p. 45,—16: "As the executor of Robert L. Stevens, he spent $89,185.39; the reason that Edwin A. Stevens claimed that he expended that money as the executor of Robert L. Stevens was, or I suppose it was, that the vessel belonged to the United States government at that time." And W. W. Shippen, the other executor testifies, page 47,—8.

"A. Edwin A. Stevens exercised the same possession 50 and control, and in the same way that Robert L. Stevens had.

Q. Since Edwin's death has the possession by the executors been the same as the testator's? A. Yes, sir." There could be no adverse possession then. He signed his communications to the government as executor, p. 47, line 51. Laches cannot be imputed until July 17th, 1862, for *C. J.* Parsons, in Stoughton *v.* Baker & Vose, 4 Mass., 522, says: "No laches can be imputed against the government, and against it no time runs so as to bar rights." (Angel on Limitations, last Ed, §§ 37 to 39). And this suit was commenced December 21st, 1868. But even admitting laches could be imputed against them until they were actually named in the amended bill, April 51 12, 1872, there would then be only about ten years to impute laches to any of them. But says Ch. Walworth, in Hurd *v.* Everett: 1 Paige Ch. 124, "The amendments to a bill, when allowed, are always considered as incorporated in, and as forming a part of the original bill." And this contract being under seal, and the mortgage being also a sealed instrument, the Statute of Limitations could only run after the lapse of sixteen years. (Stat. of New Jersey, p. 93).

Edwin A. Stevens and Edwin A. Stevens' executors
52 never spent one cent on the battery as contracted for by
the United States government, p. 57, line 16.

And Robert L. Stevens' money was spent because he agreed to spend his own money if that appropriated by Congress was not sufficient, p. 54, line 6.

The Chancellor also says p. 72,—20, concerning Robert L. Stevens: "He had given security for the performance of his contract." This security was a recorded mortgage, and is notice to all the world, p. 37 line 2. And, "If a mortgagee is duly recorded it is not laches for the mortgage to be silent concerning it." (Dick *v.* Balch, 8 Peters, 30).

Nor were the rights of these heirs (these plaintiffs in
error), first set up by their answer, but they were all
53 named and described as the heirs-at-law of Robert L.
Stevens, by the executors themselves in the amended bill,
p. 70, line 21, and by the Attorney General in his informa-
tion page 19, line 14. They were first notified of their
having any interest in in the case by the service of a no-
tice of motion to sell the battery by the attorney for the
executrix.

This was simply a gift to a class then in existence,
namely, the brothers and sisters and nephews and nieces.
They were the heirs and are so termed in this suit. If
any of them die then it is provided that there legal repre-
sentatives shall take such share. "A gift to a class im-
plies intention to benefit those who constitute the class
54 and to exclude all others," Barber *v.* Barber, 3 Myl. and
Cr. 688. "A gift to the testator's three sisters or their
children was held to be a gift to the whole class of the
daughters and the children equally, Will on Executors,
p. 1221.

III.—THE NEW JERSEY COURT OF ERRORS AND APPEALS OPINION.

The Court of Errors and Appeals, and the Chan-

cellor are directly opposed on the question, whether the
title to the battery was in the United States government
or in Edwin A. Stevens. The latter holding that the title
was in the United States, and the former that the title
was in Edwin A. Stevens, p. 72,–9, p. 77. They say in 55
reference to the case in Clark *v.* Spence, 4 Ad. & El.
448. "But the Court in that case was constrained to
observe, that, 'until, however, the last of the necessary
materials be added, the vessel is not complete, the thing
contracted for is not in existence, for the contract is for
a complete vessel, and not for parts of a vessel; and we
have not been able to find any authority for saying that,
whilst the thing contracted for is not in existence as a
whole, and is incomplete, the general property in such
parts of it as are from time to time constructed shall vest
in the purchaser, except the above passage in the case of
Woods *v.* Russell," p. 76. Owing to doubt upon this
point is perhaps the reason why this contract requires
that, "all materials of every description * * * shall become
the property of and belong to the United States." 56

The Court continues; "and the provision that certain
materials should be marked 'U. S.' and become the property
of the government, supports rather than weakens it,
for, if the the ownership of the vessel itself was to be
transferred, it seems reasonable to presume that the declaration
as to ownership would not have been limited to
the materials," p. 77. This language simply means that
the *possession* of the completed vessel is to be delivered
to the United States, who have the title. The Court
says: "Advances were to be made by the government
to Mr. Stevens, according to the amount of materials
furnished for the work, and, therefore, they were marked
"U. S." to ascertain the progress of the work." If to 57
ascertain the progress of work why does not the contract
so state, but on the contrary it says, "shall become the
property of and belong to the United States." The executors
admit Edwin A. Stevens regarded the battery as
the property of the goverment up the the Act of 1862. p.
45 and 47. The Court further says "that, when the said
Stevens shall have fully completed the said war steamer,

and when she shall have been duly accepted by the agent of the United States, and the balance of the purchase price shall have been paid, and the said mortgage surrendered." This language, used repeatedly in the 58 contract, was certainly inapt, if it was understood that the title resided in the government, p. 77. This language simply means that the contractor was bound to deliver *possession*, although the title was in the government. They conclude, "The government had the right to recover its damages against the estate of Robert L. Stevens for breach of his contract, with power to resort to the collateral mortgage." This language admits all these plaintiff's in error claim: viz, that the vessel be sold, the land mortgaged for the faithful performance of the contract be sold, and if the proceeds are not sufficient the remainder of the debt be paid out of the estate of Edwin A. Stevens, and the executors of Edwin A. Stevens must account to these heirs at law for the same.

59 As to the principal point in the case, the meaning of this resolution, they simply say: "The words of the resolution are not apt to pass a right of action." The other heirs only claim the right to participate in the profits of the sales of the old iron already made, p. 46, and of the future sales that shall be made; but why should the New Jersey heir obtain rights under the resolution and not the others. They dismiss this whole question with, "it is highly improbable," p. 78; and therefore on this improbability they claim the right to alter plain words in an Act of Congress.

It remains then for the New Jersey Courts to decide that when a gift is made by Congress to thirteen of the 60 heirs at law of Robert L. Stevens, one of whom, viz: Edwin A. Stevens, resides in the State of New Jersey, is the residuary legatee of Robert L. Stevens, that, that one takes the whole gift; and for New Jersey counsel to argue that such decisions are founded upon principles of equity and justice.

WALTER L. CLARKSON,

Attorney and Counsel for Plaintiffs in Error.

16-505

OFFICE SUPREME COURT U.S.
FILED
NOV 9 1882
JAMES H. McKENNEY, Clerk.

United States Supreme Court.

No. 88.

ANNA A. CLARKSON and ROBERT L. CLARKSON, her husband, HARRIET WETMORE and GEORGE W. WETMORE, her husband, SAMUEL SANDS, JOSHUA SANDS, and JOHN SANDS,

Plaintiffs in Error,

vs.

MARTHA B. STEVENS, JOHN STEVENS, EDWIN A. STEVENS, ROBERT L. STEVENS, CAROLINE B. STEVENS, CHARLES ALBERT STEVENS, RICHARD STEVENS, THEODORE F. RANDOLPH, Governor of the State of New Jersey, FITZ JOHN PORTER, BENJAMIN G. CLARK, and WILLIAM W. SHIPPEN, Commissioners; WILLIAM W. SHIPPEN, SAMUEL B. DOD, MARY P. LEWIS, EDWARD P. C. LEWIS, her husband, ROBERT GILCHRIST, Attorney General of the State of New Jersey, JAMES A. STEVENS, SOPHIA L. V. C. STEVENS, ESTHER B. STEVENS, and JULIANA CONOVER,

Defendants in Error.

In Error to the Court of Chancery of the State of New Jersey.

BRIEF OF FREDERIC W. STEVENS,

Of Counsel with Plaintiffs in Error.

NEWARK, N. J.:
WARD & TICHENOR, LAW CASE PRINTERS, 832 AND 834 BROAD ST.
1882.

Ward & Tichenor, Law Case Printers, 832 and 834 Broad St., Newark, N. J.

Supreme Court of the United States.

No. 88.

Anna A. Clarkson and Robert L. Clarkson, her husband, Harriet Wetmore and George W. Wetmore, her husband, Samuel Sands, Joshua Sands, and John Sands,

Plaintiffs in Error,

vs.

Martha B. Stevens, John Stevens, Edwin A. Stevens, Robert L. Stevens, Caroline B. Stevens, Charles Albert Stevens, Richard Stevens, Theodore F. Randolph, Governor of the State of New Jersey, Fitz John Porter, Benjamin G. Clark, and William W. Shippen, Commissioners; William W. Shippen, Samuel B. Dod, Mary P. Lewis, Edward P. C. Lewis, her husband, Robert Gilchrist, Attorney General of the State of New Jersey, James A. Stevens, Sophia L. V. C. Stevens, Esther B. Stevens, and Juliana Conover,

Defendants in Error.

In Error to the Court of Chancery of the State of New Jersey

STATEMENT OF THE CASE.

By an act of Congress, approved April 14th, 1842, it was enacted "That the Secretary of the Navy be and he is hereby authorized to enter into contract with Robert L. Stevens, for the construction of a War Steamer, shot and shell proof; to be built principally of iron, upon the plan of said Stevens; provided that the whole cost, including the full armament, engines, boilers and equipment, in all respects complete for service, shall not exceed the average cost of the steamers Missouri and Mississippi." *U. S. Stat. at Large*, Vol. 5, 472.

Pursuant to the terms of this act, Abel P. Upshur, the Secretary of the Navy, on February 10th, 1843, entered into a contract with Robert L. Stevens to build a war steamer (p. 48 of printed case); but the contract not proving to be sufficiently definite, a second agreement was, on November 14th, 1844, made between John Y. Mason, who had succeeded Secretary Upshur, and said Stevens, (p. 50 of case.)

This latter agreement, after reciting that the provisions of the previous one had been found too loose and indefinite, proceeded to "modify and explain" it. It provided for the various details of construction—details which are foreign to the present controversy—and it then proceeded as follows: "The said Robert L. Stevens "and John Y. Mason, as Secretary of the Navy Depart- "ment of the United States, do further stipulate and "agree that the Secretary of the Navy shall appoint, "and the said Stevens shall admit within his establish- "ment for building said war steamer, some person or "persons, whose duty it shall be to attend the works of "said Stevens, or where the said war steamer, engines, "and machinery are to be built, and *to receive and receipt* "*for on account of the Navy Department of the United States*, "*all materials of every description*, which shall be delivered "therein for constructing the said war steamer, her en- "gines, boilers and all their dependencies; which ma- "terials, when so received and receipted for shall be "distinctly marked with the letters U. S., *and shall* "*become the property of and belong to the United States;* and "it shall be the further duty of the person or persons so "appointed to receive from the said Stevens accounts, "stating the cost of all the articles thus received, and "the amount paid for all labor or salaries, *excepting for the* "*said Stevens*, actually applied to, and given to the con- "struction of the said war steamer, * * * * "duly certified by said Stevens to have been procured "and used, or to be used for those purposes, which ac-"counts when thus certified by said Stevens, and further "certified as to the actual receipt of articles and the "performance of labor, or attendance given by the per-"sons attending as the agent of the Navy Department of "the United States, shall form the evidence on which the "payments hereinafter provided for shall be authorized "and made."

It was further agreed, "that the authority of the inspecting officer should not be understood as extending to a right to judge of the quality or fitness of the materials or workmanship, but merely as to their cost and of the labor actually applied," and that such quality and fitness should be determined by persons to be appointed, one by the Secretary of the Navy and one by said Stevens; and that said Stevens, in lieu of other security for the faithful performance of this contract on his part, should "make to the United "States a good and sufficient mortgage, which cannot "in any way be affected by previous mortgages, or by "previous judgments against the said Stevens, on all the "land, docks, wharves, ships, and all their appurtenances, "belonging to and embraced within the establishment at "Hoboken, New Jersey, at which the said war steamer "is to be constructed, with ample power to enter upon "and sell the same, in case of failure on the part of the "said Stevens to fulfil his part of this contract, and that "of which this is explanatory, *or so much thereof as shall* "*be necessary to complete any deficiencies on the part of the* "*said Stevens.*"

The agreement then further provided, that the said Mason, on behalf of the Navy Department, would pay to said Stevens as the price of said steamer when fully completed, and delivered at the navy yard at Brooklyn, in comformity with the provisions of the contract, the sum of $586,717.84. The mode of payment was to be as follows: "In consideration of the security hereinbefore "expressed for the faithful performance of this contract 'by said Stevens, (and of the fact that compensation for "his time and services must be wholly deferred until the "final completing and delivery of said war steamer,) it "is hereby agreed that payments shall be made in full "from time to time by the navy agent at New York, "upon bills for not less than $5,000 each, when duly "certified by said Stevens and the agent or agents of the "United States, as hereinbefore expressed and approved "by the Chief of the Bureau of Construction, * * * " * * * until the sum of $500,000 shall have been "paid;" as to the balance, viz: $86,717.84, it was provided that that should not be paid until an examination should be made by the person to be appointed as aforesaid. If they should certify that the vessel could be completed for that sum, further bills should continue to be paid in full as before, but if not, then the navy department might make such deduction and reservation as would be sufficient to cover the probable excess of cost.

And it was further provided, that when the said Stevens should have fully completed the said steamer, and when she should have been duly delivered to and received by the agent of the United States, there should be paid any balance found due, "as the total amount to "be paid to said Stevens for the said war steamer when "fully completed and accepted;" and the Secretary of the Navy was in that event to cancel and return the mortgage.

By the terms of this contract the vessel was to have been completed in two years, but by a subsequent agreement dated Sept. 9, 1848, (p. 55 of case,) the time was extended four years from that date—no other change was made.

Congress made three appropriations for the vessel, one of $250,000, by the before mentioned act of April 14, 1842, one of $250,000 by an act passed in 1855, *U. S. Stat. at Large*, Vol. 10, p. 676, and one of $86,717.84 by act of Aug. 16, 1856, (p. 45 of case.) From the statement on p. 56 of the case, it appears that the first bill for work done, amounting to $11,282.99, was approved on Jan. 15, 1845, and the last for $7,106.64 on Dec. 14, 1855. Up to Sept. 9, 1852, the date of the expiration of the time, as extended, given to complete the boat, only $75,689.04 had been approved and paid, while between April 6, 1853, and Dec. 14, 1855, payments were made to the amount of $424,310.95. The total sum thus contributed by the United States was $500,000, and nothing was ever paid under the third appropriation. In addition to this amount Robert L. Stevens expended of his own money $113,579, before his death, which occurred in 1856, (p. 45,) and after that event, and up to Sept. 5, 1857, Edwin A. Stevens, as his executor, expended $89,185.37 more, (p. 45.) Work was then suspended until after the death of Edwin A. Stevens, on Aug. 7, 1868, (p. 8); and subsequent thereto, under a provision of Edwin A. Stevens' will, his executors expended towards its completion $919,915.49, of which $27,309.79 were for the sale of old material taken from the boat and replaced by new work (p. 25 of case.) The vessel, however, was never finished, and pending this appeal has been sold for the small sum of $75,000.

Robert L. Stevens died in 1856, possessed of a large estate. By his will (p. 58) he constituted Edwin A. Stevens one of his executors, and his sole residuary devisee and legatee; his heirs at law were his brothers, James, John and Edwin, three sisters, and the children of a deceased sister (p. 19.)

Edwin A. Stevens died Aug. 7, 1868, and by a codicil to his will, (p. 3,) conceiving himself to be the owner of the unfinished vessel, he directed his executors to complete it on his general plans, at a cost not exceeding one million of dollars, and then to offer it to the State of New Jersey as a present. The executors, after having expended $919,915.49, found that they could not finish it for the amount of money to which they were limited. So that discontinued work, and the vessel was sold as above stated.

On July 17, 1862, the following resolution of Congress was approved:—

" A resolution releasing to the heirs at law of Robert " L. Stevens, deceased, all the right, title and interest of " the United States in and to the Stevens Battery.

" Resolved by the Senate and House of Representa-"tives of the United States of America in Congress " assembled, That all the right, title and interest of the " United States in and to Stevens Battery, be and the " same are hereby released and conveyed to the heirs at " law of the said Robert L. Stevens, or their legal repre-" sentatives."

On this state of facts the question is to whom does the battery belong? To the heirs at law of Robert L. Stevens, to wit, his brothers and sisters, and the children of a deceased sister, or to the State of New Jersey as legatee of Edwin A. Stevens, who was the residuary legatee of Robert L. Stevens.

The question is raised in this wise. On Dec. 21, 1868, the executors of Edwin A. Stevens filed a bill for the construction of his will, and for a declaration as to the validity of the various trusts, devises and bequests therein contained. On Sept. 11, 1871, they filed a supplemental bill, and on April 12, 1872, an amendment, making the heirs at law of Robert L. Stevens parties. After the defendants had answered, the Attorney General, on behalf of the State of New Jersey, filed an information (p. 11) in the nature of a cross bill, making the same persons parties, and setting up the title of the State to the battery. This information was answered, testimony was taken, and on December 31, 1877, the Chancellor made a decree which, so far as relates to the battery, omitting recitals, is as follows:

" The Chancellor is of the opinion and doth declare, "that by the true construction of the said joint resolu-"tion (*i. e.* the act of July 17th, 1862,) the right and " interest of the United States in the said vessel, passed to " the said Edwin A. Stevens as residuary legatee of Robert

"L. Stevens, and that the said Edwin A. Stevens so "owning and possessing the said battery up to the time "of his death, the said vessel passed under the last will "and testament and codicil thereto, of the said Edwin "A Stevens, * * * * * * the Chancellor doth "declare that the said bequest to the State (of New "Jersey,) is absolute and not conditional, on the com-"pletion of the same, and that the title to the Stevens "battery aforesaid, has vested in the State of New "Jersey." (p. 63 of case.)

On appeal to the Court of Errors of New Jersey, taken on behalf of the heirs of Robert L Stevens, the decree of the Court of Chancery was "in all things affirmed;" though in point of fact, as appears from the opinion read in that Court, the case was decided on an entirely different ground. In their opinion Edwin A. Stevens did not take under the act of Congress at all.

ASSIGNMENT OF ERRORS.

The plaintiffs in error aver and say that in the record and proceedings in this cause, and also in the making of the decree herein, there is manifest error in this:

1. That the Congress of the United States having on the 17th day of July, 1862, passed the aforesaid resolution, "that all the right, title and interest of the United States, in and to the Stevens battery, be and the same are hereby released and conveyed to the heirs at law of the said Robert L. Stevens, or their legal representatives," the Courts of Chancery and of Errors and Appeals in the last resort, did order, declare and decree that by the true construction of said resolution, the right and interest of the United States in said vessel passed to the said Edwin A. Stevens as residuary legatee of Robert L. Stevens.

2. That the said Courts did order, declare and decree that the said Edwin A. Stevens owned and possessed the said battery up to the time of his death, and that

the said vessel passed under the last will and testament and codicil thereto of said Edwin A. Stevens.

3. That said Courts did order, declare and decree, that the bequest of said vessel made by said Edwin A. Stevens to the State of New Jersey is absolute, and that the title to the said vessel has vested in said State.

4. That the said Courts refused to decree that by the terms of the contract entered into between the Secretary of the Navy and the said Robert L. Stevens, and in particular by the terms of the contract of November 14, A.D. 1844, the title to said war steamer in its incomplete state, and every part and parcel thereof, were *ab initio* in the United States, and became and remained the property of the United States until the passage of the before mentioned act, when they passed to the heirs at law of Robert L. Stevens, that is to say, James A. Stevens, John C. Stevens, Edwin A. Stevens, Sophia L. V. C. Stevens, Esther B. Stevens, Juliana Conover, John C. Stevens, Mary Sands, Matilda Brown, Anna A. Clarkson, Harriet S. Wetmore, John Sands, Joshua Sands and Samuel Sands.

5. That the said Courts refused to decree that by the terms of said resolution the contract of November 14, 1844, and all the right of action thereon, including the mortgage to secure the faithful performance thereof, passed to the heirs at law of Robert L. Stevens.

6. That the said Courts refused to decree that the words "heirs at law" mean all the heirs at law of said Robert L. Stevens living at the time of the gift.

7. That the said Courts refused to decree that the executors of the residuary legatee, who was the executor of said Robert L. Stevens, must account to the other heirs for the moneys received from the United States by Robert L. Stevens, with interest, or for so much money as was necessary to complete the vessel according to the contract of November 14, 1844, and make up for any deficiencies on the part of said Stevens as provided for in said contract; and that the lands mortgaged to

secure the faithful performance of said contract be sold to pay and satisfy the moneys which were so due the United States, and that if the proceeds of sale be not sufficient to pay the same with interest, that the deficit be made out of the estate of Edwin A. Stevens.

8. That the said Courts refused to decree that said executors should account to the other heirs for the value of the materials and machinery, parcel of said battery sold and taken away by said executors.

And there is also error in this, that a decree was made against the said heirs at law of Robert L. Stevens, whereas it should have been made in their favor; wherefore the plaintiffs in error pray judgment, and that the decree aforesaid, for the errors aforesaid, and other errors found and being in the record and proceedings aforesaid, may be reversed and altogether holden for nothing; and that the said heirs may be restored to all things they have lost by occasion of said decree, and that the Court here may proceed to examine the record and proceedings aforesaid.

BRIEF OF THE ARGUMENT.

Two main questions are presented by the above assignment of errors.

(1.) In whom is vested the title to the vessel?

(2.) In whom is vested the title to enforce the contract?

1st. To answer the first question we must inquire (1.) In whom was the title vested under the contract of Nov. 14, 1844? (2.) If in the United States, to whom was it given by the resolution of Congress of July 17, 1862? and (3.) If given to the heirs at law of Robert L. Stevens, *i. e.* to his brothers and sisters then living and the children of a deceased sister, have they done anything to forfeit the gift?

The Court of Chancery decided that the title to the battery was vested in the United States under the contract, and that being so vested Congress gave it to the residuary legatee of Robert L. Stevens, to wit, his brother Edwin, who, in the opinion of that Court, was the person designated by the words "heirs at law." The Court of Appeals, on the other hand, apparently unable to put upon these words so forced a construction, held that the title to the vessel was originally in Robert L. Stevens, and passed under his will, thus arriving at the same conclusion by a different route. As these two tribunals have taken conflicting views of the matter, the grounds of their opinion will be examined separately.

And, first, as to the opinion of the Court of Appeals. It holds that the case comes within the operation of the rule established in *Elliot* vs. *Edwards*, 6 Vr., 265; 7 Vr., 449; which decides in comformity with the decision in *Andrews* vs. *Durant*, 11 N. Y., 35, that under a contract for the building of a vessel, no property vests in the purchaser, even where certain portions of the contract price are agreed to be and are paid to the builder at specified stages of the work, and where an agent of the purchaser is to and does superintend such work and approve the materials. These decisions are in conflict with a long line of English cases, commencing with *Woods* vs. *Russell*, decided by Lord Tenterden—(*Woods* vs. *Russell*, 5 B. and Ald., 942; *Clarke* vs. *Spence*, 4 Ad. and El., 448; *Carruthers* vs. *Paine*, 5 Bing., 270; *Laidler* vs. *Burlinson*, 2 Mees. and Wels., 602; *Wood* vs. *Bell*, 5 El. and Bl., *772, affirmed in Exchequer chamber, 6 El. and Bl., 355; *McBain* vs. *Wallace*, L. R., appeal cases, Vol. 6, 589,) with the rule as adopted and approved by nearly all the text writers; Benj. on Sales, p. 315; Addison on Contracts, chap. 6, sec. 1, p. 176, Eng. Ed; Chitty on Contracts, Vol. 1, p. 531, 11th Amer. Ed.; Maude and Pollock, Law of Merchant Shipping, p. 52, 4th Ed.; Story on Sales, § 315, 316; Long on Sales, 168, 288, and with several American cases: *Moody* vs. *Brown*, 34 Maine; *Butterworth* vs. *McKinley*, 11 Humphrey, 209,—the rule as it obtains in New York having been expressly repudiated in *Sandford* vs. *Wiggins' Ferry Co.*, 27 Ind., 522, and by Mr. Justice CLIFFORD, in *Scudder* vs. *Calais Steamboat Co.*, 1 Clifford, 370; the case of *Williams* vs. *Jackman*, 16 Gray, 514, is not contra, though cited as being so; Chief Justice BIGELOW taking pains to distinguish it from *Woods* vs. *Russell*, and *Clarke* vs. *Spence*, with which it is plainly consistent; at the time of this last decision, *Woods* vs. *Bell*, and *Sandford* vs. *Wiggins' Ferry Co.*, had not been decided. The case of *Scull* vs. *Shakspear*, 75 Penn. St., 220, is, in the point decided, consistent with the English rule. In *Edwards* vs. *Elliot*, 6 Vr., 265, 7 Vr., 449, the Court seems to be under a misapprehension as to the earlier English cases, and with little force of argument, follows *Andrews* vs. *Durant*, *supra.* The only intimation of opinion given by this Court on the subject is found in what Mr. Justice CLIFFORD says in his dissenting opinion in *Calais Steamboat Co.* vs. *Scudder*, 2 Black., 380. In this opinion he adopts the English rule, but the case turned on another point.

The rule contended for is the more equitable one, especially when the contest is between builder and purchaser, or those claiming under them as volunteers. The foundation of the decision in *Woods* vs. *Russell*, says BAYLEY, J., in *Atkinson* vs. *Bell*, (8 B. and C. 277,) "was that as by the contract given portions of the price were to be paid according to the progress of the work, by the payment of those portions of the price, the ship was irrevocably appropriated to the person paying the money. That was a purchase of the specific articles of which the ship was made." Now the contract, in the class of decisions of which *Andrews* vs. *Durant* is the representative, is silent as to the precise point of time when the title passes. If it be held to pass when the money is paid, both parties receive adequate protection. The builder is protected because the common law gives him a lien upon the vessel for such work and material as he may put upon it. The purchaser is protected because, being invested with the title, the builder cannot dispose of it against his wish. In *Andrews* vs. *Durant*, it is admitted that the purchaser is entitled to the very boat in course of construction, for the obvious reason that he has made payments on that boat and no other, at particular stages of the work, and for the additional reason that his agent has supervised its construction; but if this right be unaccompanied with title, it is of little avail, for title in the builder carries with it power to confer title upon a stranger.

As it is conceded by all the authorities that the question is one of intention merely, as deduced from the agreement itself, is it not more reasonable to presume that the parties intended that which would secure both of them against the wrongful acts of either, than rather that which would place the purchaser at the mercy of the builder ?

It is conceded by the Court below that had they followed the English rule they must have held the title to be in the United States under the contract, and of course if the English rule be adopted by this Court, further argument is unnecessary. But it is respectfully submitted that it is entirely immaterial to the decision of this cause whether that rule be adopted or not. It is held in all the cases that the INTENTION must prevail; but it is said in the class of cases following *Andrews* vs. *Durant*, that an intention to vest the title in the purchaser, is not sufficiently indicated by a provision for payment of the work by installments and for supervision of the work by an agent of the purchaser, the general rule as to title in the case of contracts for the manufacture of goods being otherwise; that other circumstances of a less ambiguous character must co-exist; that if they do the title will pass, notwithstanding the agreement is executory.

Such circumstances, beyond all question, exist in the present case. The contract of Nov. 14, 1844, provides for payment in full of all labor performed and material furnished, to be paid by the United States in bills of not less than $5,000 as the work progresses. Then follows this provision: "The Secretary of the Navy shall appoint * * * * * some person or persons, whose duty it shall be to attend to [at] the works of said Stevens, or where the said war steamer, engines and machinery are to be built, and *to receive and receipt for on account of the Navy Department of the United States, all materials of every description* which shall be delivered therein for constructing the said war steamer, her engines, boilers and all their dependencies, which materials when so received and receipted for on account of the Navy Department of the United States, shall be distinctly marked with the letters U. S., *and shall become the property of and belong to the United States.*

Here, then, is the additional circumstance required by the New York rule as evidence of what the parties intended, and a stronger circumstance expressed in more vigorous language it would be hard to find. "All materials of every description" entering into the vessel, are to be received and receipted for by an agent appointed on behalf of the Government; are to be paid for by the Government as the work progresses, in bills of not less than $5,000; and are, upon being so received and receipted for, to become the property of the United States. If this be not evidence of an intention to vest the title in the Government during the progress of the work, it is hard to imagine what would be; and yet the Court refers to this very clause as evidence of a contrary intent; it says, (p. 77 of case,) "The provision that "certain materials should be marked U. S., and become "the property of the Government, supports rather than "weakens, [the view contended for,] for if the own- "ership of the vessel itself was to be transferred, it "seems reasonable to presume that the declaration as to "ownership would not have been limited as to materials. "If it had been the purpose of the explanatory agree- "ment to vest the title in the Government, it is reason- "able to suppose that there would have been a clear "expression to that effect, and that neither party "would have been content to leave so important a "matter to uncertain inference; advances were to be "made by the Government to Mr. Stevens according to "the amount of materials furnished for the work, and "therefore they were marked U. S., to ascertain the pro- "gress of the work, so that the Government would not "pay faster than the work was done, and also to prevent "misappropriation of any such materials by diverting "them to other uses after the Government had advanced "money to the contractor, to an amount based upon the "value of such materials."

This is pure sophistry. The Court conceding, as they must, that the material belonged to the United States, say that it is matter of "uncertain inference" to whom belonged the partially built vessel composed of that material—which is no other than asserting that the title to all the parts may be in one—the title to the whole at the same time in another. To give the argument a more plausible look, "certain material" is substituted for "all material of every description," and it is suggested that the marking it with the initials U. S., was intended to ascertain the progress of the work, and prevent misappropriation. That so marking it would have a tendency to prevent embezzlement will readily be admitted, but how marking raw material would have a tendency to ascertain the progress of the work, it is hard to conceive. It is still more difficult to imagine what force either of those suggestions can have in the argument, when we recollect that after it is provided that all material of every description shall be distinctly marked with the letters U. S., there follow these words "*and shall become the property of and belong to the United States.*"

Now it is quite manifest that the argument employed does not meet the real issue. It being provided that all material of every description entering into the composition of the vessel shall belong to the United States, it is incumbent on the defendants in error to show, if they can, that this provision is controlled or modified by some other which vests the title elsewhere. No such other clause can be found. The title being then in the United States, the defendants' argument must be this—"True, it was the intention of the contracting parties to vest that title first in the United States, but then as the material was being put into shape and joined together, it was the further intention of the parties to vest it so far as joined, in the contractor, Robert L. Stevens, and only when all of it had been used and the vessel was completed, was it the intention to re-vest in the United States the title to the whole." Not the least evidence of any such intent is anywhere apparent, and it may well be retorted that if an intention so unusual as *this* had been entertained by the parties, *it* certainly would not have been left to uncertain inference.

The reason for vesting the title in the Government is clear. As these materials were paid for by the Government it was right that it should acquire the title to them, so that they should not be subject to Robert L. Stevens' debts.

But it is said that taking the whole contract together it is manifest that the Government did not intend to become the owner unless she were a success. This position has already been answered by a consideration of that provision in the agreement which stipulates for the ownership of the material. It is said that she was only to be *accepted* in case she should prove capable "of offering the resistance which the builder stipulated she should show under fire." No such stipulation is contained in the agreement. The only stipulation was that she should be accepted when she should have been constructed, and delivered in accordance with the terms of contract. Again it is said that the giving of security for the faithful performance of the contract militates against the idea that the Government should acquire title in the boat before she was completed. How the giving of security could have that effect it is difficult to see. More particularly in view of the fact that she was not included in the mortgage, and that it is provided that the Government should have the right to sell the land mortgaged "in case of failure on the part of said Stevens to fulfil his part of the contract, or so much thereof (*i. e.* of the lands) *as shall be necessary to complete any deficiencies on the part of said Stevens.*" A clear intimation that if the contract were not complied with the Government would take the vessel and make good her deficiencies out of the property of said Stevens.

Again, it is said that the idea that the title passed out of the builder is excluded by the language, "That when the said Stevens shall have fully completed the said war steamer, and when she shall have been duly *accepted* by the agent of the United States, the balance of the purchase price shall be paid and the said mortgage surrendered." "This language," it is said, "is inapt if it was understood that the title resided in the Government." Now it may be remarked that all through the agreement there is a careful avoidance of any term of art indicative of a transfer of title from Robert L. Stevens to the United States. The words deliver, receive and accept, are the only ones employed, and they certainly do not, in the connection they are used, point to such transfer. The vessel was to be delivered when completed, in the same sense that a coat made with the materials which I have provided is delivered to me by my tailor when made up. It was to be received and accepted in the same manner that I would receive and accept that coat if I were satisfied with the tailor's work. Any other construction of these words in the connection in which they are used, would be forced and unnatural. The vessel was to be accepted, so as to show that in the opinion of Government the contract had been complied with, and Robert L. Stevens released from all liability; and a refusal to accept would have no other effect than to compel Robert L. Stevens more perfectly to fulfil his engagements, or, in case of his failure to do so, to enable Government, in the language of the contract, (p. 53 of case,) "to sell so much [of the mortgaged premises] as shall be necessary to complete any deficiencies on the part of said Stevens."

In the foregoing discussion the question has been viewed in the light in which it was regarded by the Court of Errors; but it is conceived that the case does not fall under the principle of *Andrews* vs. *Durant*, or *Woods* vs. *Russell*, at all. It falls under a simpler principle, and one which has never been controverted. The Court of Appeals do not go so far as to assert that the property in the materials did not pass to the United

States; all they intimate is that when those materials were partially joined together, Robert L. Stevens became temporary owner of the joined parts. Now, if the materials did, in point of fact, belong to the United States, and Robert L. Stevens took those materials and built, or partially built a vessel out of them, the product belonged to the United States. "If," says BAYLEY, J., in *Atkinson* vs. *Bell*, 8 B. and C., 277, "you employ a man to build a house on your land, or to make a chattel with your materials, the party who does the work has no power to appropriate the produce of his labor and your materials to any other persons. Having bestowed his labor, at your request, on your materials, he may maintain an action against you for work and labor." So in Coursen's Appeal, 79 Penn. St., 220, Justice SHARSWOOD says, approvingly: "According to the doctrine of the Pandects, if one repairs his vessel with another's material, the property of the vessel remains in him; but if he builds the vessel from the very keel with the materials of another, the vessel belongs to the owner of the materials. The property is supposed to follow the keel; *proprietas totius navis carinae causam sequitur*," and see *Glover* vs. *Austin*, 6 Pick., 209.

Indeed it would seem from the language of the contract that Robert L. Stevens was regarded as little more than an agent of the United States, and not an independent contractor. The work and material were to be paid for directly by the United States. The work was done under the supervision of United States officers, who were required to defer to the skill of Robert L. Stevens as an engineer and inventor; and his interest in the contract is viewed in the light of a salary (p. 52 of case,) or compensation for his time and services, (p. 53) deferred until the completion of the work.

II. From the foregoing considerations the conclusion is that the property in the unfinished vessel, under the terms of contract, was originally in the United States, and not in Robert L. Stevens. The title there remained until the approval of the resolution of Congress on July 17, 1862.

The resolution read as follows:

"A resolution releasing to the heirs at law of Robert L. Stevens, deceased, all the right, title and interest of the United States in and to Stevens Battery.

"Resolved, by the Senate and House of Representatives of the United States of America, in Congress assembled, That all the right, title and interest of the United States in and to Stevens Battery, be and the same are hereby released and conveyed to the heirs at law of the said Robert L. Stevens, or their legal representatives."

The Chancellor decided that having regard to the circumstances of the case, it was the intention of Congress to give the vessel not to the heirs of Robert L. Stevens, but to Edwin A. Stevens, his residuary legatee, who happened also to be one of his heirs; (p. 72 of case.)

Now if such were the intention, it is an intention not to be gathered from the words of the act. In terms the battery is given to a class, viz., heirs at law, a term of well-known legal significance. The individuals who compose this class are the brothers and sisters of Robert L. Stevens and the children of a deceased sister. But the Chancellor says in his opinion, (p. 73 of case) that upon a consideration of extraneous circumstances, the heirs must hold in trust for the residuary legatee, and he changes the act so as to read as follows: "Resolved, That all the right of the United States in the battery be released and conveyed to the heirs at law of Robert L. Stevens *in trust for his residuary legatee.*" This can only be done in violation of one of the best established rules found in the books. Potter's *Dwarris on Stat.*, 203; *Sedgwick Stat. Con.* 2d ed., p. 205. *Merritt* vs. *Welsh*, 14 Otto, 694. It is true that in the construction of a statute Courts are to look at the intent of the Legislature, but it must be the intent deducible from the words used, and not from extraneous circumstances, *Sedg. Stat. Con.* p. 208. If, however, the defendants in error disclaim the right to add to the act in the manner stated, then they must hold that the words "heirs at law" and "residuary legatee" are convertible terms. A plain absurdity.

But why, if Congress wished to confer a benefit upon Edwin A. Stevens alone, did it not do so by a direct gift to him. He was personally well known to many of the officials in Washington, both in and out of Congress; he had been in Washington that very spring, (1862,) (p. 44 of case,) and had secured the passage of another act, (Act of April 17th, 1862,) giving him a conditional appropriation to complete the vessel; and he is mentioned in that act by name. (U. S. Stat. at Large, Vol. 12, p. 380.)

If it be suggested that Congress, or some of its members, may have supposed that Edwin A. Stevens was the only heir, this is pure conjecture, and is rebutted by the resolution itself, which speaks of more persons than one—heirs and not heir. And not only heirs, but heirs *or* their legal representatives—words importing substitution and providing for the case of a deceased heir who leaves representatives entitled in equity to share with the survivors. *Gettings* vs. *McDermott*, 2 M. & K., 69. *Story Eq. Jur.*, § 1065, b, note (at end).

Again, the words of transfer are, RELEASE and CONVEY—the latter of which is proper to vest an interest in him who had no previous right, but not apt to confer a further interest in him who already claims one. On the other hand, if it be considered that Congress knew that Edwin A. Stevens was one of the heirs of Robert L. Stevens, then *reddendo, singula singulis*, the words of the act would be well fitted to answer their expressed purpose.

It is said, however, that the phrase heirs at law is not a proper expression to be used in reference to a gift of personalty. This betokens confusion of thought. The term is inapt to denote succession to personal property or the course of its devolution, but entirely proper to denote a class of individuals constituted donees, who are to take immediately. The donor may give to whom he pleases, and he may designate them by their individual names or by the name of a class, *e. g.*, children, next of kin, first cousins, heirs at law—the only restriction is that the recipients of his bounty be designated by some term embracing a class whose members are ascertainable. Accordingly it has been held that the same individuals will take personalty under the description heirs at law, who would have taken realty had the gift been of that. *Williams' Executors*, p. *997; *Mouncey* vs. *Balmire*, 4 Russ., 384; *In re*, *Crawford's Trusts*, 2 Drewr., 230. And, even if it be conceded (which it is not) that the expression is unsuited to the nature of the gift, and an inaccurate designation of the brothers and sisters, still more inappropriate and inaccurate is it as a designation of a residuary legatee who might have been a stranger to the blood of Robert L. Stevens.

The argument that it is likely that Congress intended Edwin A. Stevens to be the donee of the vessel, because he took the great bulk of his brother's property, would rather seem to be an argument on the other side, in view of the maxim that equality is equity. In the matter of successions the cardinal rule of legislation has been to give equal shares to those who stand in equal degree. If inequality in those shares had been produced by the will of Robert L. Stevens, is it not probable that Congress, who was bestowing a favor and not granting a right, should seek to lessen rather than to increase such inequality?

But it is urged by the Chancellor, as a reason why Edwin A. Stevens may be deemed to have been the person intended by the resolution, "that Robert L. Stevens "in his lifetime, and his brother after his death, as his "residuary legatee, had an equitable interest (using the "term interest not in the technical but in the popular "sense) in the vessel. * * If the vessel had been "finished and proved * * a success, they had reason "to expect from the bounty, not to say justice of the Government, at least repayment of the private funds ex-"pended in its construction." But the vessel never was finished—never did in point of fact prove a success, and the Government had expended of its own money $500,000, for which it had received no equivalent—consequently neither Edwin nor Robert Stevens had any legal or equitable claim upon Government, or its property, for the money paid by themselves. But concede that they had an equitable interest in the popular sense of the word, what is the result?

The Government had spent upon the boat prior to Robert Stevens' death in 1856...	$500,000 00
Robert L. Stevens spent.................	113,579 00
Edwin Stevens spent up to Sept. 15, 1857..	89,185 25
	$702,764 25

It appears that Edwin spent a little more in the maintenance of the boat, &c. (p. 45 of case,) but the amount above stated was all that was proved. Now, Robert's interest, such as it was, not being transmissible by will, belonged as much by natural right to one heir as to another. Edwin, therefore, had no exclusive claim upon that. All the claim he had was in respect of his own expenditures, viz, $89,188.25, and his interest in the whole boat would thus be represented by the fraction $\frac{8918525}{70276425}$, which as one of the seven brothers and sisters of Robert L. Stevens, the resolution actually returned to him.

But the Chancellor says further, that "It is evident "from the language of the resolution that Congress "intended only a relinquishment of the title of the Gov-"ernment to the property for the benefit, and it will be "presumed to have been intended in augmentation of, "the estate of Robert L. Stevens. * * There appears "to have been no reason why the Government should "make the heirs at law, rather than the next of kin or "residuary legatee of Robert L. Stevens, the recipients of "its bounty." Now, because the Court can see no reason for an act of legislature, that is no reason why it should refuse to give it effect. If Congress saw fit to prefer the heirs at law to the residuary legatee, might it not do so?

But the Court cites as authority for this position the case of *Stevens* vs. *Bagwell*, 15 Vesey, 139, a decision which on examination seems rather favorable to the claims of the heirs. There Lieutenant Stevens, after having taken part in the capture of a fort, died. The prize money, to which none of the officers were entitled as a matter of right, was after his death granted by the Crown (*inter alios*) to his *representatives.* The money was claimed by the next of kin, but the Court gave it to those representatives, not beneficially, but in their character as such. The decision was based chiefly upon the intention of the Crown, which had become well understood in cases of that kind, and the use of the word "representatives" was thought to imply a design to benefit the personal estate of the deceased. Surely the term heirs at law conveys no such implication.

The whole question seems to be set at rest by the decision of this Court in the case of *Emerson's Heirs* vs. *Hall*, 13 Peters, 409. Emerson was surveyor of the Port of New Orleans, and made a seizure, which resulted in a condemnation and sale of the vessel seized. Through some defect in the law he had no valid claim to a distributive share of the proceeds of the sale. After his death Congress passed an act entitled "An act for the relief of the *heirs* of William Emerson." In the body of the act, however, the direction was that the money should be paid to his legal representatives. A claim was set up by certain of his creditors that it had been given in augmentation of his estate, but the Court denied the claim and said it was clear that the heirs were the persons to whom it was given, and that they took it as a gift from Government directly to themselves.

It may be considered then that upon the passage of the resolution of 1862, the heirs took title beneficially.

III. The question remains, have the heirs so conducted themselves since that time that they are now estopped from setting up their title?

The Chancellor remarks upon their supposed laches, but (p. 71) he falls into a manifest error; he charges the heirs with having stood by and seen Edwin A. Stevens in his lifetime, prior to the passage of the resolution of 1862, expend $100,000 of his own money upon the vessel; he had, however, just before declared that it was clear, that prior to 1862, the vessel belonged to the United States. If such be the fact, (and it is indisputable,) the heirs had not, prior to that time, the slightest interest in, or title to the boat, and consequently not the shadow of a right to intefere with Edwin A. Stevens, if he chose to expend his money upon Government property. They could not be guilty of laches in not asserting title until they got title; so that the real question is, have they been guilty of laches since the resolution was passed? As to this the following considerations are decisive:

1st. From the time of the passage of the resolution of 1862, down to the present time, the vessel has been in the possession of Edwin A. Stevens, one of the tenants in common of the vessel under the act, or his executors. The possession of one tenant in common is the possession of all.

2d. There is no evidence whatever to show that after July, 1862, and prior to his death, Edwin A. Stevens expended any money whatever upon the vessel beyond what was paid for pumping to keep the dock dry. He at least, therefore, has no equity for improvement as against the heirs. If, as alleged, they stood by—he was not injured by it.

3d. There is no evidence to show that the heirs knew of their rights before the executors became cognizant of them; the pleadings do not charge notice, and the evidence does not disclose any. Some of the heirs were infants at the time of the gift. In no event, therefore, can the heirs be chargeable with laches for not asserting rights of which they were ignorant. *Story Eq. Jur.*, Vol. 1, § 386, 391.

4th. They are not chargeable with constructive notice, for the act was not a public act, but a private resolution.

5th. On the other hand, every one is presumed to be cognizant of the contents of the muniments through which he claims title—both Edwin A. Stevens and his executors knew that his only title was derived from an act of Congress, (p. 48 of case,) and they are presumed to have been cognizant of the nature of that act and of their title under it; the case of Edwin A. Stevens differs from that of the other heirs in this: Edwin A. Stevens knew of the act, and knew that his title depended on it; the other heirs knew neither.

6th. Admitting that the money was expended by the executors in actual ignorance of the true nature of their title, (which is willingly conceded,) surely the Court will not visit the consequences of that ignorance upon those who are the least open to the imputation of any negligence, even constructive.

7th. The only remaining question here arising, is whether the heirs are entitled to the battery as enhanced in value by the moneys expended upon it by the executors, or only to the property or its value as it stood before such improvements were made.

The authorities indicate the following distinctions: Where the owner is ignorant of the fact of his title, and is therefore guilty of no laches, he is entitled to the property as he finds it improved. *Story Eq. Jur.*, Vol. 1, § 386; *Putnam* vs. *Ritchie*, 6 Paige, 405. So if he is under a disability. *Antonidas* vs. *Walling*, 3 Gr. Ch., 43; *Moore* vs. *Cable*, 1 John. Ch., *385. But if he knows or ought to have known of his title, and remains silent, to another's prejudice, such silence not being fraudulent, he must allow for the actual benefit conferred upon him. *Green* vs. *Biddle*, 8 Wheat., on p. *77; *Benedict Gilman*, 4 Paige, 52; *Mickles* vs. *Dillaye*, 17 N. Y. 80, on p. 84, 92.

Of course it is unnecessary to refer to cases where there is actual fraud, or a guilty and wilful silence under circumstances which make it a duty to speak; in these cases the rule is different—but they are foreign to the case in hand.

8th. That the parties in the present case stand in the relation of tenants in common to each other, will not alter the application of the rule discussed in the preceding paragraph. *Master of Clare Hall* vs. *Harding*, 6 Hare, 1289.

9th. The benefit actually received, and not the money expended, is the rule of compensation where compensation is decreed. (*Smith* vs. *Drake*, 8 C. E. Gr., on p. 307; *Michels* vs. *Dillaye*, 17 N. Y., on p. 89,) but the present case falls under the rule as laid down in *Putnam* vs. *Ritchie*, *supra*.

It may be proper to notice one or two points of minor importance.

Of the acts of the legislature of New Jersey, p. 60 of case, it is enough to say (1) that they do not profess to adjudicate a question of title; (2) that the State is an interested party, and for that reason incompetent to decide upon its own case; and (3) that the legislature is not the proper forum to interpret acts of Congress.

As to the act of Congress of July 1st, 1870, (p. 60,) it is clear that if under the resolution of 1862 the heirs obtained a vested right, not even Congress itself had the constitutional power to divest it. The right once transferred, the vessel became the private property of the heirs, which Congress could take for public uses only on making just compensation. It is suggested, however, that the heirs having failed to accept the gift, Congress revoked it by the act in question. To this it is answered (1) that no intent to revoke is apparent on the face of the act. It was passed for an entirely different purpose; (2) that the resolution of July, 1862, constituted an unconditional gift, which the heirs are presumed to have accepted as it was for their benefit, and the presumption of acceptance will only be rebutted by proof of dissent, (*Lessee of Mitchell* vs. *Ryan*, 3 Ohio St. 378; *Smith on Contracts*, p. * 34.) This presumption is all the stronger in the case of the infant heirs. (3) Edwin A. Stevens, one of the heirs, beyond question accepted it, and his act as one of the tenants in common named in the resolution, will enure to the benefit of his co-tenants.

Again, it is urged that the act of 1870 is a legislative construction of the resolution of 1862. But if the language of the resolution be unambiguous, there is no room for construction; if the act is to have the operation claimed for it, then a subsequent Congress would, under the guise of a declaratory act, be really divesting what had before become vested. To the judicial branch of the Government alone is given the power to construe statutes. *Aiken* vs. *Western Railroad*, 20 N. Y., on p. 373; *Bingham* vs. *Supervisors*, 8 Minn., 441. And the fact is, that Congress has not attempted to construe the act. The supposed interpretation of it is contained in the preamble, not in the body of the act itself; but the only use which the preamble can have is to clear up any doubt arising in the body of the act; it cannot confer any right or power, *per se*, (*Sedg. Stat. Con.*, p. 43, 2d Ed.); it cannot even be used as evidence of the facts therein recited, *Elmendorf* vs. *Carmichael*, 4 Litt., (Ken. 9) 47, much less is it to be resorted to as an authoritative exposition of what a previous Congress intended when it made the gift in question. And it appears from the answer of the commissioners (p. 22 of case,) that they prepared the bill and procured its passage *in behalf of the State.*

The remaining question in the case is whether the resolution of July 17, 1862, (p. 60 of case) passed to the heirs, not only the incomplete vessel, but also the rights of the United States under the contract. As this point is argued at length in Mr. Clarkson's brief, it is only necessary to add to his observations the following: The question is one of construction. What did Congress intend to give to the heirs, when it released and conveyed to them all the right, title and interest of the United States, in and to Stevens Battery? More than an incomplete vessel. As it stood, at the time of the gift, it was no *battery* at all. In giving, then, a *battery*, Congress must be presumed to have intended a gift of the vessel, so far as it had progressed, and of the means which the United States possessed of compelling its completion. Those means were no other than the right of action under the contract and the mortgage given to secure its performance.

October Term, 1882.

FREDERIC W. STEVENS,
Of Counsel with the Plaintiffs in Error.

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OFFICE SUPREME COURT U.S.
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Supreme Court of the United States.

No. 88.

Anna A. Clarkson and Robert L. Clarkson, her husband; Harriet Wetmore and George W. Wetmore, her husband; Samuel Sands, Joshua Sands and John Sands,

Plaintiffs in Error.

vs.

Martha B. Stevens, John Stevens, Edwin A. Stevens, Robert L. Stevens, Caroline B. Stevens, Charles Albert Stevens, Richard Stevens; Theodore F. Randolph, Governor of the State of New Jersey; Fitz-John Porter, Benjamin G. Clark and William W. Shippen, Commissioners; William W. Shippen, Samuel B. Dod, Mary P. Lewis, Edward P. C. Lewis, her husband; and Robert Gilchrist, Attorney-General of the State of New Jersey,

Defendants in Error.

IN ERROR TO THE COURT OF CHANCERY OF THE STATE OF NEW JERSEY.

Brief and Argument for Defendants in Error.

JOHN P. STOCKTON,
Attorney-General of the State of New Jersey.

LEON ABBETT,
Of Counsel for Defendants in Error.

Supreme Court of the United States.

No. 88.

ANNA A. CLARKSON and ROBERT L. CLARKSON, her husband; HARRIET WETMORE and GEORGE W. WETMORE, her husband; SAMUEL SANDS, JOSHUA SANDS, and JOHN SANDS,
Plaintiffs in Error,

vs.

MARTHA B. STEVENS, JOHN STEVENS, EDWIN A. STEVENS, ROBERT L. STEVENS, CAROLINE B. STEVENS, CHARLES ALBERT STEVENS, RICHARD STEVENS; THEODORE F. RANDOLPH, Governor of the State of New Jersey; FITZ JOHN PORTER, BENJAMIN G. CLARK, and WILLIAM W. SHIPPEN, Commissioners; WILLIAM W. SHIPPEN, SAMUEL B. DOD, MARY P. LEWIS, EDWARD P. C. LEWIS, her husband; and ROBERT GILCHRIST, Attorney-General of the State of New Jersey,
Defendants in Error.

In Error to the Court of Chancery of the State of New Jersey.

STATEMENT OF FACTS.

There is no dispute about the facts of this case. They are fully stated in the opinion of the Chancellor, reported in 28 N. J. Equity Reports (1 Stewart), page 487. Briefly recapitulated, the facts are these:

Robert L. Stevens, in his life time, conceived a plan for constructing a shot and shell proof war steamer for harbor defence, which has since been commonly known as the Stevens' Battery. He sought the aid and co-operation of the United States Government in carrying out his plan. He secured the passage by Congress of an act entitled "An act authorizing the construction of a war steamer for harbor defense," approved April 14, 1842, which authorized the Secretary of the Navy to enter into a contract with him for the construction of a war steamer shot and shell proof, &c., (p. 35 of Record). An appropriation was made by Congress in that act, and subsequently a further appropriation was made, amounting in all to $500,000.

The first contract made with the Government was February 10, 1843, (p. 48 of Record). Subsequently a second contract was made, November 14, 1844, (p. 50 of Record), and afterwards a further agreement was made, September 9, 1848, (p. 55 of Record).

The parties differ in reference to the correct interpretation of these contracts.

In 1849 the United States Government, which had advanced $500,000 towards the construction of the vessel, refused further aid, and work on the battery was suspended. It was resumed again in 1853, and continued up to or near the time of Robert L. Stevens' death.

Robert L. Stevens died in 1856, leaving him surviving his brothers—Edwin A. Stevens, James A. Stevens, and John C. Stevens, and his sisters Sophia C. V. C. Stevens, Juliana Conover, and the children of his sister Harriet

Sands, and leaving a will wherein he made Edwin A. Stevens his residuary legatee (p. 58 of Record). At the time of his death he had expended on the vessel $113,579 of his own money, and $500,000 of money belonging to the United States.

Edwin A. Stevens, as residuary legatee, took possession of the battery, and up to September 5, 1857, had expended thereon $89,185.27 of his own money (p. 18 of Record).

The United States Government had refused in 1849 to pay for any more work or material on the battery, and in January, 1851, the Navy Department insisted that the contract was void.

In February, 1862, Edwin A. Stevens presented a memorial to Congress praying that an appropriation might be made to complete the vessel.

Congress, April 17, 1862, acted upon this memorial by passing an act making an additional appropriation for the naval service for the year ending June 30, 1862, (12 U. S. Stat. at Large, 380). This act appropriates $783,294. The second section of the act is as follows:

> "And be it further enacted, That the sum of $783,294, being the amount necessary to be provided, as estimated by a board appointed for that purpose, to pay for and finish the Stevens' battery now partially constructed at Hoboken, New Jersey, be and the same is hereby appropriated out of any money not otherwise appropriated for the immediate construction of said battery: Provided, That in the contract for the completion of said vessel it shall be stipulated that no part of the money claimed by Edwin A. Stevens to have been heretofore expended by him upon said vessel shall be refunded until the amount of said claim shall be established to the satisfaction of the Secretary of

the Navy, and the payment of the said sum shall be contingent upon the success of said vessel as an iron-clad, seagoing, war steamer, to be determined by the President, and such contract shall stipulate the time within which the vessel shall be completed: Provided nevertheless, That said money shall not be expended unless the Secretary of the Navy is of opinion that the same will secure to the public service an efficient steam battery."

The Secretary of the Navy did not enter into a contract and thereupon Congress, July 17, 1862, passed the following resolution:

"A RESOLUTION releasing to the heirs at law of Robert L. Stevens, deceased, all the right, title and interest of the United States in and to the Stevens' battery:

"*Resolved*, by the Senate and House of Representatives of the United States of America, in Congress assembled, That all the right, title and interest of the United States in and to the Stevens' battery be and the same are hereby released and conveyed to the heirs at law of the said Robert L. Stevens, or their legal representatives."

It is under this resolution that the plaintiffs in error claim an interest in the Stevens' battery. The plaintiffs in error are six of the seven children of Harriet Sands, living at the date of the death of Robert L. Stevens. The fractional interest which they thus represent is the only interest they claim in the Stevens' battery.

At the date of the passage of the resolution of July 17, 1862, Edwin A. Stevens was in possession of the Stevens' battery and had been since 1856, the date of the death of Robert L. Stevens. Edwin A. Stevens died August 7, 1868, leaving a will and codicil thereto annexed (pp. 2-8, incl. of Record). The clause of his will affecting the Stevens' battery will be found on page 6 of the Record, where he empowers his executors to expend $1,000,000 in finishing the battery and gives them the use of certain land, docks, yards and basin where the battery was then lying, and he directs that when finished the executors shall offer the battery to the State of New Jersey, as a present, to be disposed of as the State should deem proper, or if the State should not take it to sell it as a part of his residuary estate.

The right of the State to take this battery being questioned, Congress was appealed to, and on July 1, 1870, the following resolution was passed :

"A RESOLUTION giving the consent of Congress to the reception of a certain bequest by the State of New Jersey under the will of the late Edwin A. Stevens :

"*Whereas,* Edwin A. Stevens, *who was in his life time the owner* of the ship known as the Stevens' Battery, originally commenced under contract for the United States Government, and upon the building of which large sums of money were spent by his brother and himself, did, by his last will and testament (the United States having previously relinquished all claims to said ship), leave the same to be finished by his executors at an expense not exceeding the sum of one million of dollars, and when finished to be offered to the State of New Jersey as a present, to be by her received and disposed of as the said State shall deem proper ; and

"*Whereas,* Doubts have been suggested as to the right of the said State to accept the said bequest without the consent of Congress, under the prohibition of the tenth section of the first article of the Constitution of the United States ; therefore,

"*Resolved,* by the Senate and House of Representatives of the United States of America, in Congress assembled, That the consent of Congress is hereby given that the State of New Jersey shall receive and dispose of the said ship according to the terms and conditions of said bequest." (P. 60 of Record).

The State of New Jersey, April 1, 1869, had passed a resolution (Laws 1869, p. 1482), and in 1871 the Legislature of New Jersey passed an act authorizing the sale of the battery (Laws 1871, p. 133).

The suit below in the Court of Chancery was originally a suit for the construction of the will of Edwin A. Stevens with request for direction to the executors.

The Attorney-General of New Jersey, July 21, 1873, deemed it necessary to file an information (page 11 of Record) specially setting up the State's right in the Stevens' battery, and he made parties defendants to this information those who were technically the heirs at law of Robert L. Stevens, for the purpose of settling their claim. The answer to this information on behalf of the plaintiffs in error was filed December 6, 1875.

The Court of Chancery (1 Stewart, 477) and the Court of Errors and Appeals (2 Stewart, 602) have both held that the battery, under the will of Edwin A. Stevens, the act of the Legislature of the State and the act of Congress of July 1, 1870, was the property of the State of New Jersey. The plaintiffs in error are the only persons who dispute this conclusion.

Thus it will be seen that the only parties in interest here are the plaintiffs in error, representing 6-7 of one-sixth of the estate of Robert L. Stevens, on the one hand, and the State of New Jersey on the other. All the other heirs of Robert L. Stevens have acquiesced in the decree of the Court below.

The only issue before this Court is whether or not the Stevens' battery belonged to the State of New Jersey or to the plaintiffs in error and the other technical heirs at law of Robert L. Stevens.

ARGUMENT FOR DEFENDANTS IN ERROR.

IT IS CONTENDED BY THE STATE OF NEW JERSEY THAT EITHER OF THE FOLLOWING IS A CONCLUSIVE ANSWER TO THE CLAIM OF THE CHILDREN OF MRS. SANDS TO AN INTEREST IN THE STEVENS' BATTERY:

1st. That the only claim of title by the children of Mrs. Sands is under the resolution of Congress of July 17, 1862, and that the proper interpretation of that resolution does not create an interest in them.

2d. That even if the resolution of July 17, 1862, would have the effect to create a new title in the children of Mrs. Sands, they never accepted the proffered gift, and while the gift remained in this condition, unaccepted by them, Congress, by the resolution of July 1, 1870, recognized that Edwin A. Stevens was in his life time the owner of the battery and also recognized the validity of the bequest of the same by Edwin A. Stevens to the State of New Jersey, and gave its consent that this State should receive and dispose of said ship according to the terms and conditions of said bequest.

3d. That the battery on July 17, 1862, did not belong to the United States Government, so as to enable them to give it to the heirs of Robert L. Stevens even if Congress desired to do so. That the proper interpretation of the three contracts between Robert L. Stevens and the United States Government in connection with the act of Congress of April 14, 1842, shows that the title of the battery was to remain in Stevens until accepted by the Government, as a completed vessel in accordance with the specifications.

4th. That even if the children of Mrs. Sands would have a lawful claim under the resolution of July 17, 1862, to an interest in the Stevens' battery, and the same really belonged to the United States to give at that time, yet, that the plaintiffs in error are estopped from setting up any such title, having acquiesced in the continued possession and claim of ownership made by Edwin A. Stevens and his executors and laid by quietly, permitting them to expend about a million of dollars and use certain property, and do various other things under the belief that the battery belonged to Edwin A. Stevens and his estate, and, subsequently, to the State of New Jersey.

5th. That in analogy to the statute of limitations, the plaintiffs in error should be barred from a recovery in this case, as over six years elapsed after the passage of the resolution of July 17, 1862, before they made any claim to an interest in the battery. The first suggestion of any such claim having been made by the Attorney-General in his information, filed July 21, 1873, (p. 11 of Record).

I.

THE PROPER INTERPRETATION OF THE RESOLUTION OF JULY 17, 1862, IS THAT IT WAS A RELEASE OF THE INTEREST OF THE UNITED STATES IN THE STEVENS' BATTERY TO AND NOT A CONVEYANCE OF THAT INTEREST TO NEW PARTIES.

At the date of the passage of the act of April 16, 1862, and of the resolution of July 17, 1862, Edwin A. Stevens was in possession of the battery (p. 63 of Record) claiming to own the same as residuary legatee under the will of Robert L. Stevens.

It was the intention of Congress, in view of this condition of things and in view of the adverse opinion of the Secretary of the Navy, not to appropriate any more money for the Stevens Battery, but to release all the interest that the government had in the battery. It was not the intention of that resolution to make any distinct conveyance to any of the heirs of Robert L. Stevens, or to create any new right or title in them. but, merely to surrender whatever interest the government had in the vessel.

The plaintiffs in error have no claim or title to any interest in this battery unless they can maintain it under this resolution. If this resolution is simply a release of the interest of the United States and not the creation of a new right by conveyance, then the plaintiffs in error have no claim whatever to the battery.

The title of the resolution of July 17, 1862, shows that it was simply the intention of Congress to *release* the interest of the government. The words "release" and "convey" are in the body of the resolution, but the word "convey" is not in the title, so that a fair interpretation of the word "convey" in the body of the resolution is that it is only a conveyance in so far as it operates as a release.

It is evident from the language of the resolution that Congress intended only a relinquishment of the title of the government to the Stevens Battery for the benefit—and it will be presumed to have been intended in augmentation of the estate of Robert L. Stevens. The language is "the heirs at-law of the said Robert L. Stevens or their legal representatives." There appears to have been no reason why the government should make the heirs at-law, rather than the next of kin, or the residuary legatee the recipients of its bounty.

The language of the resolution of 1862, does not give to the brothers and sisters of Robert L. Stevens or their children any title to the battery; or if it does, it is only a title to be held in trust for the residuary legatee under the will of Robert L. Stevens.

The preamble to the resolution of Congress of July 1, 1870, consenting that the State of New Jersey accept the Stevens battery is some evidence of the intention of Congress in the former resolution. It recites that Edwin A. Stevens was in his life time the owner of the battery and that upon the building thereof large sums of money had been spent by him and his estate and that he had by his last will and testament (the United States having previously relinquished all claim to the ship) left it to be finished by his executors, &c., and when finished to be offered to the

State of New Jersey, etc. Congress did not intend by the resolution of 1862 to grant it to the heirs at law of Robert L. Stevens or their legal representatives for their benefit, but merely designed to effect the relinquishment of the interest of the United States in the vessel to those who were entitled to the estate which Robert L. Stevens owned at the time of his death, and the heirs at law or their legal representatives will be held to have received title to it in trust for the residuary legatee to whom, as a part of his personal estate it would have gone if he had the title to it at the time of his decease.

Stevens vs. Shippen, 28 N. J. Eq. R., 487, 529, etc.

II.

THE TITLE TO THE STEVENS BATTERY AT THE TIME OF THE DEATH OF EDWIN A. STEVENS, WAS IN HIM; AND UNDER HIS WILL AND THE ACTS OF THE LEGISLATURE OF NEW JERSEY AND THE RESOLUTION OF CONGRESS IT PASSED TO THE STATE OF NEW JERSEY.

The general rule of law is that under a contract for the building of an entire vessel no property vests in the party for whom she is built until she is ready for delivery and has been accepted by said party.

It may be that this general rule does not prevail where the vessel is constructed under the superintendence of the party, or his agent, for whom the vessel is built, and payments therefor based upon the progress of the work are to be made by installments as the work is done. In such cases the person for whom the vessel is built may be regarded as the real owner. The plaintiffs claim that this case is an exception to the general rule under the authority of Scudder v. Calais Steamboat Company, (1 Cliff., 370, 378). If that case is to be regarded as an authority there is a clear distinction between it and the present case. The United States Government never asserted any claim to the battery as a whole, but regarded the enterprise as a failure, and relinquished, without any consideration, whatever right or title it had. Moreover the materials branded "U. S.," although they entered into the construction of the vessel formed only a small portion of the entire battery. In the first place materials to the extent of over $100,000 were paid for by Robert L. Stevens, and materials to the extent of over a million dollars were subsequently paid for by Edwin A. Stevens and his executors, and these were not branded "U. S." The mortgage which he had given was simply for the faithful performance of his contract. The idea that the mortgage passed to the heirs at-law of Robert L. Stevens or his legal representatives or to anybody else by the resolution under which the plaintiffs in error here claim title is simply absurd, and there is nothing to support such a claim.

Robert L. Stevens was an enthusiast, actuated solely by a desire to benefit the United States Government by carrying out his own ideas. He acted throughout in entire good faith and so did his brother Edwin A. Stevens, and the executors of his estate.

It is claimed by the plaintiffs in error that the three contracts of February 10, 1843, November 14, 1844, and September 9, 1848, referred to in the statement of facts, vested the title of the battery in themselves and special stress is laid upon the fact that the contract of November 14, 1844, (p. 52 of Record) provides that the Secretary of the Navy "shall appoint and the said Stevens shall admit into his establishment—some person or persons whose duty it shall be to attend and to receive and receipt for, on account of the navy department of the United States all materials of every description which shall be delivered therein for constructing the said war steamer, her engines, boilers, and all other dependencies, *which materials when so received and receipted for shall be distinctly marked with the letters "U. S." and shall become the property of and belong to the United States.*"

The defendants in error claim that these contracts did not vest any such title in the United States and that the language of the other parts of the contracts shows that the title of the steamer as a completed steamer was not intended to be vested in the United States until there was a delivery to the Secretary of the Navy and an acceptance by him thereof. In support or this view attention is called to the act entitled, "An act authorizing the construction of a war steamer for harbor defence," approved April 14, 1842, (5 U. S. Stat. at large, 472), under which these contracts were made, which act certainly did not contemplate anything but a contract for building an entire vessel which should be shot and shell proof and whose cost was not to exceed an amount named in the act.

The act of April 14, 1842, only authorized the Secretary of the Navy to enter into a contract with Robert L. Stevens for the construction of a war steamer shot and shell proof (p. 35 of Record). The contract of February

10, 1843, was a contract to build such a steamer. The contract of November 14, 1844, was merely explanatory of the former contract. This expressly provides for a delivery in certain contingencies to the United States and provides for the acceptance of the vessel by the United States.

It is this contract which contains the provision as to branding certain articles "U. S.," and stating that the same shall belong to the United States as its property. In a subsequent part, however, of this same contract, when mentioning the battery as a whole, it provides for the delivery thereof to the United States by Robert L. Stevens.

The further contract of September 9, 1848, continues to recognize the agreement as a building contract which is thereby extended four years "for the completion and delivery of said war steamer." This last contract also says: "the extension of time for the completion of said war steamer being the only change or modification of the terms of that contract (contract of November 14, 1844,) as intended by these presents."

A fair construction of the act of 1842, and the three agreements made under it is that Robert L. Stevens was to build a war steamer that would resist shot and shell and that when he had completed it he was to deliver it to the United States; if they found it was the vessel called for by the contract the government was to accept it, and pay the balance due to Robert L. Stevens. The vessel was certainly, under these conditions, the property of Robert L. Stevens until delivered and accepted by the United States. The United States never accepted it; they stopped making advances and refused to have any thing further to do with it, and when Edwin A. Stevens, after the vessel had passed into his hands, wanted the United States to advance more money they passed the act of April 17, 1862 (12 Statutes at Large, 380). This left the matter in the hands of the Secretary of the Navy whose decision being against it, the United States refused to advance any more money, and passed the resolution of July 17, 1862, releasing all their interest in the battery.

It is certain that no contention was ever raised by anybody that the vessel belonged to the United States. The Attorney General of the State of New Jersey suggested the possibility of such a contention in his information filed July 21, 1873, (p. 11 of Record). From 1856 up to 1873, a period of seventeen years, every one had acted upon the supposition that the battery belonged to Edwin A. Stevens, the residuary legatee of Robert L. Stevens, and after his death to the State of New Jersey. The United States Government permitted the vessel to remain in the hands of the Stevens family. Edwin A. Stevens spent $89,185 37 of his own money, and his executors subsequently spent nearly a million dollars under his will in endeavoring to complete the steamer. Congress in 1870, authorized the State of New Jersey to accept the steamer, the legislature of New Jersey accepted it, and after all parties had acted upon the view for seventeen years that the United States had no interest in the steamer whatever—certainly not after the passage of the resolution of 1862—a claim was, in 1873, for the first time suggested on the part of the children of one of the sisters of Robert L. Stevens.

The practical construction given to the contracts certainly was that the United States had no interest in the battery and whatever claim they had was one under the mortgage which Robert L. Stevens had given as security for the performance of the contracts with the United States. This mortgage given in 1848 has never been enforced or attempted to be enforced, but if acted upon by the United States it must be under the theory that Stevens entered into a contract to construct a steamer and failed to deliver it according to the contract, and that therefore, the United States is entitled to damages against him or his estate, for which this mortgage is to be treated as collateral security. In support of this view see the reasoning in the case of Stevens v. Shippen, 29 N. J. Eq. R., 602, &c.

III.

If the six children of Harriet Sands, one of the sisters of Robert L. Stevens, were ever entitled to any interest in the Stevens' battery under the resolution of 1862, they should be estopped from asserting any such claim as they did for the first time in their answer to the information which was filed by them December 6, 1875, (p. 34 of Record). This answer, while it asserts that two of the children of Harriet Sands were infants at the time of the passage of the rosolution of July 17, 1862, is very careful not to say when they became of age, or to say that at the time of the commencement of this suit in the Court of Chancery of New Jersey, in 1868, they were not of age. As Mrs. Sands died before Robert L. Stevens, these children were all living in 1856, and if only ten years of age at that date they would have been of age when the original bill was filed in the Court of Chancery. These six grandchildren of Robert L. Stevens sit by without a word and see Edwid A. Stevens spend nearly $90,000 of his own money, see the executors of Edwin A. Stevens spend nearly $1,000,000 of the money of the estate to complete the vessel, and see all this done under a claim of title and, also, under a recognition of such title by the act of Congress of July 1, 1870. If they ever had a shadow of title they should be estopped from asserting it after having laid by and permitted these expenditures.

More than six years having elapsed since the act of 1862, in analogy with the statute of limitations of New Jersey, barring an action after six years for possession of personal property, or any interest therein, equity ought to refuse recognition of the claim of the plaintiffs in error.

IV.

The decree of the Court of Chancery of the State of New Jersey should be affirmed with costs, and the cause remanded to that Court, with directions to dismiss the complainants' bill with costs.

JOHN P. STOCKTON,
Attorney-General.
LEON ABBETT,
Of Counsel for the State of New Jersey.